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ABSTRACT

"FCC v. Pacifica Foundation," a 1978 case involving a radio broadcast considered to be indecent, was the first United States Supreme Court litigation using the right of privacy, or the right not to hear, as a rationale for broadcast regulation of programing. The issue of pornography best illustrates the judiciary's understanding of the conflict between the right to be heard and the right not to hear. The ruling in the "Pacifica" case maintained that it was not that the content of the indecent speech was not protected, but rather, the manner in which it was presented--over the broadcast media when children might be listening--that strips the presentation of its constitutional right to be heard. However, since broadcasters cannot guarantee that no children will be in a supposedly adult audience, the right not to hear is not viable justification for reducing an adult listener's freedom through broadcast regulation. Parents and guardians must accept the responsibility for monitoring a child's exposure to broadcast media. (HTH)

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THE RIGHT NOT TO HEAR AS A RATIONALE FOR BROADCAST REGULATION: A REVIEW AND AN APPRAISAL

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THE RIGHT NOT TO HEAR AS A RATIONALE FOR BROADCAST REGULATION: A REVIEW AND AN APPRAISAL

That broadcast media--in contrast to their print counterparts--require special federal attention in the form of licensing and other means of control is an old and familiar issue. Since 1934, when Congress endowed the Federal Communications Commission with "the comprehensive powers to promote and realize" broadcasting's "vast potentialities," the government has assumed responsibility for securing the "maximum benefits" of radio--and later television--for "all the people."[1] Whereas print media can be operated at the whim of their owners, broadcast media cannot; as the Court of Appeals acknowledged in 1966, broadcasters are necessarily burdened by "enforceable public obligations."[2]

What appears to be a principal rationale for government control of broadcasting is a constitutionally sanctioned "right of access" to a balanced and equitable "marketplace of ideas": insofar as broadcasting is concerned, Justice White made clear in Red Lion, it is the consumer's right to hear, not the producer's right to be heard, which is paramount.[3] To be sure, the right to hear as a rationale for regulating broadcasting has been subject to considerable scrutiny; its most eloquent proponent, Jerome Barron, has written widely and critically on the subject.[4] However, its contrapositive--the right not to hear--emerges as a new and novel consideration; as a rationale for broadcast regulation, its potential remains untapped and largely unexamined.

The right not to hear as a rationale for broadcast regulation--specifically, a listener's right of privacy as a rationale for regulating indecent

programming--was introduced by the Supreme Court in 1978 in FCC v. Pacifica Foundation.[5] Since broadcast media are "uniquely pervasive" and often intrude upon listeners in the privacy of their homes, the Court ruled, broadcasters have a special obligation to avoid unseemly, inappropriate or otherwise offensive language. That is, since listeners are peculiarly susceptible to intrusive expressions, broadcasters must protect the sanctity of the home by recognizing and accommodating the public's need to be untrammeled by objectionable programming. That listeners can protect themselves by changing stations or unplugging the radio, the Court reasoned, in no way establishes immunity for the intruder.[6] In short, certain kinds of broadcast expressions may constitute a form of intrusion and thus violate the listener's right of privacy.

Beyond its narrow ruling on the authority of the FCC to regulate indecent language, however, the Pacifica Court made little effort to confront the larger constitutional issue: when in theory or practice, does statutory protection of privacy from nongovernmental intrusion by expression satisfy the demands of the First Amendment? As a statement of principle, regrettably, the Court's decision in Pacifica evades the most fundamental question of all: can broadcast programming that is not indecent be deemed intrusive and therefore subject to a listener's right of privacy?

In an effort to assess the right not to hear as a viable rationale for regulating broadcasting, this paper examines its genesis, its application to broadcasting, and its proper place in our system of freedom of expression.

Privacy, Pornography and Broadcasting

Typically and historically, a mere connection between speech and privacy would not in itself constitute a compelling argument in favor of restricting freedom of expression. All expression, Alexander Bickel reminds us, affect the "mode and quality" of life and thus, to a greater or lesser extent, "impinge unavoidably on the privacy of each of us."[7] However, when speech truly violates--willfully and unreasonably--an individual's privacy, it may well fall within what the Supreme Court recognizes as "certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem."[8] Or as Justice Harlan once observed, when "substantial privacy interests are being violated in an essentially intolerable manner," government may "shut off discourse" for no other reason than to "protect others from hearing it."[9] At the very least, intrusive expressions lie at the "periphery of First Amendment concern" and may be permissibly restrained as to the time, place and manner of their public dissemination.[10]

Of the variety of speech with which privacy might come in conflict, pornography serves best to illustrate the judiciary's understanding of the occasional tension between the right to be heard and the right not to hear. For in its attempt to confront the obscenity quagmire, the Supreme Court begins to identify the contours--by no means the details--of the complex and at times paradoxical relationship between speech and privacy. Specifically, several important obscenity decisions--as well as the Court's definition of indecency in Pacifica--develop or at least allude to the confusing and often contradictory argument that restricting expression protects privacy.

The Public Access-Private Possession Paradox

If producers of obscene material can be denied the Constitutional protection of freedom of speech and press, as the Court found in Roth v. U.S.,[11] does it follow that consumers of obscene material also lack Constitutional protection? According to the Supreme Court, no: the mere possession of obscene matter, Justice Marhsall said on behalf of the Court in Stanley v. Georgia, "cannot constitutionally be made a crime."[12] More to the point, the Constitutionally protected right to receive information and ideas[13] allows individuals complete discretion and autonomy when it comes to satisfying their intellectual and emotional needs in the privacy of their home. "If the First Amendment means anything," Justice Marshall wrote, "it means that a State has no business telling a man, sitting alone in his house, what books he may read or what films he may watch."[14]

However, two years later, in 1971, the Court explained that Stanley rests on a narrow and precisely delineated privacy right. Notwithstanding Stanley's emphasis on freedom of thought in the privacy of the home, obscene matter may be made contraband by virtue of its content and thus "removed from the channels of commerce"; a port of entry--to either the nation or a state--is not, the Court realized, "a traveler's home."[15] Similarily, in three decisions in 1973, the Court cautioned that the "privacy of the home" to which Stanley refers does mean a "zone of privacy" that follows individuals wherever they may go. In the context of pornography, a privacy right and a public accommodation, for example, are indeed mutually exclusive.[16]

Thus if privacy isused in Stanley as a justification for allowing individuals to possess obscene material, it is used in subsequent cases as a

justification for restricting the flow of obscenity. That is, if Stanley protects the private reading, listening and viewing of obscene material, it does not create the correlative right to transport, sell, give or acquire it. Bickel, whose essay on pornography and censorship the Court quotes with approval, explains why:

> A man may be entitled to read an obscene book in his room, or expose himself indecently there, or masterbate, or flog himself, if that is possible, or what have you. We should protect his privacy. But if he demands a right to obtain the book and pictures he wants in the market, and to foregather in public places--discreet, if you will, but accessible to all--with others who share his tastes, then to grant him his right is to affect the world about the rest of us, and to impinge on other privacies. Even supposing that each of us can, if he wishes, effectively avert the eye and stop the ear (which, in truth, we cannot), what is commonly read and seen and heard and done intrudes upon us all, want it or not.[17]

For Bickel and the Court, in short, privacy claims appear as a justification for both protecting an individual's right to have obscene material and society's right not to have it.

And yet if access to obscenity requires restriction because it intrudes upon the sensibilities of the public, as Bickel argues, how can the Court protect the individual's right to possess it? That the Court endorses a policy that will allow individuals to possess obscene matter but not at the same time receive it is a paradox not lost on Justice Douglas, who complained that without the ancillary right of access, the right to possess could be

realized only "if one wrote or designed a tract in his attic and printed or processed it in his basement, so as to be read in his study."[18] Put another way:

> If my right of privacy involves a right to use and peruse materials of my own choosing, it is not (in this respect) worth much if I cannot lay hold of the kind of thing I like to peruse. But, on the whole, I cannot get hold of it unless I can acquire it, and I cannot without difficulty acquire it unless someone is disseminating it. Again, if he is passing it to me by my desire and with my consent, the privacy-based objection to trading in obscene articles appears on the face of it to have little force. So if there is . . . anything in either the argument for or the argument against anti-obscenity laws so far as they are based on the right of, or the value of, privacy, it appears that at some point a balance has to be struck between the rights of privacy protected by prohibitions on obscenity and the competing rights of privacy infringed by such prohibitions.[19]

Where, when and how the Court might strike a balance between such privacy claims--or between privacy interests and freedom of expression--is an issue to be resolved only on an ad hoc basis. Either through a balancing theory or a definitional approach, the Supreme Court offers no clear and convincing conception of the right of privacy. Although its Constitutional status was established in 1965,[20] privacy as a legal doctrine remains underdeveloped.[21]

Consistent with Stanley and its progeny, the Court continues in its quest to protect what Bickel calls the "diffuse private endeavors of an

overwhelming majority of people to sustain the style and quality of life minimally congenial to them."[22] The risk inherent in this approach, Bickel acknowledges, lies in a "tyrannical enforcement of supposed majority tastes."[23] How far will the Court go in defining pornography as a public nuisance--what one critic characterizes as an "offense against everyone in general and no-one in particular"?[24] Whether the idiosyncratic tastes of one, eccentric individual deserves less Constitutional protection than the just-as-idiosyncratic tastes of society at large is not only the principal privacy issue but an important First Amendment concern as well.

How far the Court may go in protecting society from pornography--even when that protection violates the privacy of an individual and contravenes the First Amendment--became apparent in 1978 when a plurality of the Court introduced to broadcasters a new and novel dilemma: Constitutionally protected speech may be subject to a listener's right not to hear.

Indecent Broadcasts and the Listener's Right of Privacy

While the Supreme Court has long recognized that obscene speech is not protected by the First Amendment,[25] it only recently expanded the class of non-protected speech to include "indecent" speech. The Court, in FCC v. Pacifica, affirmed the Constitutionality of Title 18 of the U.S. Code 1464 which makes it illegal to utter "any obscene, indecent, or profane language by means of radio communication."[26] This case, which involved a station the FCC declared guilty of broadcasting indecent programming, was the First Supreme Court review of the indecency prohibition, though there had been other broadcasters found to be in violation of this same statute previously.[27]

The case at hand involved the broadcast on Pacifica radio station WBAI-FM of a George Carlin routine in which he repeatedly used common four-letter epithets in what the licensee's judgement was a satirical examination of our language taboos. The broadcast, preceded by a warning about the potentially offensive language, was part of a discussion program involving contemporary uses of language. It generated a listener complaint which the FCC chose to act on.[28]

The Commission's finding, temporarily overturned by the Court of Appeals but ultimately affirmed by the Supreme Court, declared that the broadcast presented words[29]

> depict(ing) sexual and excretory activities and organs in a manner patently offensive by contemporary community standards for the broadcast medium and are accordingly "indecent" when broadcast at a time when children were undoubtedly in the audience . . . . (T)he language as broadcast was indecent and prohibited.[30]

The Commission's operational definition of program content that should be prohibited because it is indecent falls short of definitions of obscenity. Indeed, the Supreme Court suggested identifying indecent speech by its "non-conformance with accepted standards of morality."[31] The Court and Commission agreed that the presumed presence of children in the audience would be essential to any finding of indecency. The conclusion they offer is not that the content of the speech itself is not or should not be protected, but rather the manner in which it is presented -- over the broadcast media when children might be in the listening audience -- strips the presentation of its Constitutional rights.

It is the form of the presentation that is responsible for some speech losing its Constitutional protection. The words, the content, in and of themselves are not indecent. Nor, in the Carlin case, were Carlin's live performance, the recording, nor the transcript of that recording indecent. It was the form of the presentation, the broadcast during the afternoon, that was indecent. "Words that are commonplace in one setting," Justice Stevens explained, "are shocking in another."[32] He noted that the capacity to offend" and the "social value" of the type of sexually-oriented offensive (though not obscene) speech at issue here "vary with the circumstances."

The notion that "protected" speech can be barred from "inappropriate" forums harkens back to and extends the bounds of nuisance protection. The Commission noted that "the law of nuisance does not say that no one shall maintain a pigsty; it simply says that no one shall maintain a pigsty in an inappropriate place. . . ."[33] The proper way to deal with nuisance, the Commission adds, is not to prohibit it but rather to channel it to an appropriate time or place. The Court, in agreeing with this line of reasoning, added "a 'nuisance may be merely a right thing in the wrong place - like a pig in the parlor instead of the barnyard.'"[34] "We simply hold that when the Commission finds that a pig has entered the parlor, the exercise of its regulatory power does not depend on proof that the pig is obscene."[35]

The Commission and the Court attempt to protect the listener from such nuisance as a result of their novel extension of privacy protection. Generally, privacy law protects individuals. "In Pacifica, however, the Court presupposes a shared privacy right, presumably a concern common among listeners and viewers of broadcast media."[36] Thus broadcast listeners as

a class deserve heightened privacy protection from intrusive offensive programming because broadcasting is pervasive and enters the home, "a place where people's privacy interest is entitled to extra deference."[37] Justice Brennan (with whom Marshall joins) dissents in Pacifica suggesting the FCC and Court paid undue deference to the listeners' rights of privacy.[38] Nevertheless, those enhanced privacy rights, based on presumed characteristics of the broadcast listening experience, stand. It is those characteristics we will examine in the next section.

Privacy Protection and Broadcast Regulation

Protecting the listener's right of privacy by "channeling" indecent broadcasts is but an example of how privacy becomes a justification for restricting expression. More important is the Supreme Court's understanding of the peculiar tension between broadcasting and privacy and its view--as well as the FCC's view--of the role government should play in striking a balance between the two. That broadcasting deserves special attention because of its uniquely intrusive nature not only implies a special concern for the privacy of the listener but may signify a broader interest in the continued regulation of radio and television.

Privacy as a rationale for regulating broadcasting, in turn, rests on two related, though distinct, aspects of the broadcaster's audience: (i) the audience's "captivity" and (ii) the inevitable and uncontrolled presence of children as listeners.

The Broadcaster's Captive Audience

Being a captive audience is a necessary and sufficient condition for finding communication intrusive and thus in violation of the listener's right or privacy. As difficult as it may be to operationally define "captive

audience," the Court has identified at least two essential attributes: (1) the audience's inability or powerlessness to avoid unwanted communication and (2) whether the listener is at home or in a public place.

For an audience to be captive it must have no reasonable opportunity to avoid objectionable language; otherwise "the First Amendment does not permit the government to prohibit speech as intrusive."[39] Clearly, any attempt to regulate offensive but ordinarily protected speech requires a finding that the listener is more than merely inconvenienced; the listener's privacy must be violated in such a way that the only plausible remedy would be a restriction on the time, place or manner of the speech. Under the Constitutional guarantees of freedom of speech and press, a speaker must have the opportunity to reach the willing listener. Thus the broadcaster's audience is a captive one, according to the Court, in the sense that objectional programming--due to the very nature of broadcasting--enters the home with no forewarning; unsuspecting listeners, it follows, have virtually no control over what they may hear or when they may hear it. That the listener may turn off the radio after being exposed to offensive language, Justice Stevens noted in Pacifica, is an inadequate solution; he likens this to running away after the first blow.[40]

Moreover, the FCC and the Courts have long maintained that listening to radio or viewing television is less of a deliberate act that reading a newspaper or, say, attending a motion picture.[41] Although the FCC's efforts to promote multiple outlets and unique radio formats suggest that it believes listeners take an active role in selecting programming, the Commission's interest in mandating fair and equitable progrmming rests on the assumption

that listeners are essentially passive. The FCC's predecessor, the Federal Radio Commission, adopted a similar view when it observed that listeners are "powerless to prevent . . . unwelcome messages from entering the walls of their home. Their only alternative, which is not to tune in on the station, is not satisfactory."[42]

Passive or not, an audience cannot be thought of as captive if it receives communication in public. "The mere presumed presence of unwitting listeners and viewers," the Court said in Cohen v. California, "does not serve automatically to justify curtailing all speech capable of giving offense."[43] Similarly, in Public Utilities v. Pollak, the Court found that broadcasting music and commercials in streetcars and buses over the objections of passengers did not justify a claim of invasion of privacy.[44] However, a privacy claim in a public accommodation is "nothing like the interest in being free from unwanted communication in the confines of one's home."[45] And broadcast media, the Pacifica Court ruled, confront the "citizen, not only in public, but also in the privacy of the home, where the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder."[46] Just as the Court in Kovacs v. Cooper justified restrictions on amplified speech,[47] the Court in Pacifica sanctioned channeling as an appropriate remedy for intrusive broadcasts.

Children and Objectionable Programming

Children represent a special class of citizen without the "full capacity for an individual choice which is the presupposition of First Amendment guarantees."[48] Accordingly, protective or restrictive controls on some forms of speech may be permissible; "a state or muncipality," for example, "can adopt

more stringent controls on communicative materials available to youtns than on those available to adults."[49] The court also endorses a "variable obsenity standard" for children; while parental control should effectively exclude children from consuming unsuitable communications, the court noted, "the knowledge that parental control or guidance cannot always be provided and society's transcendent interest in protecting the welfare of children justify reasonable regulation of the sale of material to them."[50]

However, if broadcasting is "designed to be received by millions in their homes, cars, on outings . . . without regard to age, background or degree of sophistication," [51] then it becomes very difficult to protect any one segment of the listening audience. And since children deserve special protection from offensive communication, the commission and the court are faced with an interesting dilemma: how can broadcasters accommodate a child's privacy needs without at the same time imposing "childish tastes" on the general public?

For the Federal Communications Commission, indecent language is defined in terms of the presence of children in the audience. In its response to WBAI's broadcast of Carlin's monologue, the Commission ruled that the concept of indecency is:

> intimately connected with the exposure of children to language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs, at times of day when there is a reasonable risk that children may be in the audience. Obnoxious gutter language describing these matters has the effect of debasing and brutalizing human beings by reducing them to their mere bodily functions, and we believe such words are indecent . . . and have no place on radio when children are in the audience.[52]

Adults would be free to hear indecent expressions only during an "appropriate hour."

Broadcasting, Privacy and Freedom of Choice

Central to the argument that broadcast audiences need special privacy protection is the notion of a "passive" or "powerless audience." It is the captive audience, the audience that cannot stop receiving the offensive communication, that is entitled to extra protection from intrusion by speech. The broadcast audience member at home is not such a captive.

The person inviting a public medium designed for public reception (radio or television) into the home, car, etc., by actively turning that medium on, is not passive. Taking home and reading a newspaper requires similar effort on the consumer's part. And although the newspaper reader might glance upon an offensive story or advertisement, no one seriously suggests that newspaper readers are captive audiences because they can avoid such content only after first noticing it. Likewise, broadcast audiences are not intruded upon when they invite a public medium into their homes. Justice Brennan, in his Pacifica dissent, suggests that listeners who voluntarily invite radio into their homes reduce their privacy rights to those of people in public places.[53]

No one can dispute that the initial contact with offensive programming can be both disruptive and annoying to the unconsenting listener. The case might also be made that sound may be more intrusive than something we look at.[54] Certainly the blare of a sound truck can be more intrusive than the sight of an offensive billboard. The different degrees of First Amendment protection afforded various media depends, in this case, not so much on how offensive

or intrusive the medium can be, but rather on how easily the unconsenting audience members can separate themselves from the communication. By necessity, whether the communications medium is that of mailed billing inserts, outdoor billboards, door-to-door solicitors, etc., it is the consumers who are responsible for turning away the offensive communication -- after, of course, first finding themselves exposed to the offensive communication. The audience is not protected from having to make the choice of whether to turn away. It is the active audience member who makes the choice. And the offended radio listener

> who inadvertently tunes into a program he finds offensive . . . can simply extend his arm and switch stations or flick the "off" button . . . .[55]

Expecting the listener to accept the risk involved in listening to a public medium or accept the responsibility to turn off an offensive program is no more demanding than the risk an individual takes in going to hear a public speaker nor the responsibility he has to himself to leave if offended.

Insofar as broadcasting does <u>not</u> have a captive audience, freedom of expression and privacy are mutually supportive. As Emerson proposes, privacy is designed to "support the individual" and "protect the core of individuality";[56] individual autonomy and freedom of choice are its underlying values. As such, a listener's right of privacy is necessarily diminished by restricting either the production or distribution of broadcast programming. No law, Haiman demonstrates, will serve the interests of privacy if it attempts to insulate people from the initial impact of any kind of communication; a law is needed only to protect an individual's right "to escape from a continued bombardment by that communication if they wish to be free from it."[57] Any regulation of broadcasting rooted in a right of privacy, it follows, should promote more

and better expression and, in the end, serve only to enhance and protect the listener's opportunity to receive -- and choose from among -- a wide variety of expressions.

That children may be exposed to objectionable language is not in itself a sufficient justification for reducing an adult listener's freedom of choice. As an agency of and for public communication, broadcasting's commitment is to the public at large. Since broadcasters cannot guarantee that no children will be in the audience -- even if a program is intended for an adult constituency -- parents and other guardians must accept responsibility for monitoring a child's exposure to broadcast media.

Ultimately, a broadcaster's audience has ample opportunity to protect its own privacy, and thus there is no apparent need for government intervention in this area. In short, the right not to hear does not appear to be a viable rationale for broadcast regulation.

1 National Broadcasting Co. v. U.S., 319 U.S. 190, 217 (1943).

2 Office of Communication of United Church of Christ v. FCC, 359 F. 2d 994, 1003 (D.C. Cir. 1966).

3 Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969).

4 See for example Jerome A. Barron, "Access to the Press--A New First Amendment Right" in D.M. Gillmor and J.A. Barron (eds.), Mass Communication Law, 2nd ed. (St. Paul: West Publishing Co., 1974). Also, Jerome A. Barron, Freedom of the Press for Whom? (Bloomington: Indiana University Press, 1973).

5 FCC v. Pacifica Foundation, 3 Med. L. Rptr. 2553 (S. Ct. 1978).

6 As Justice Stevens put it: "Because the broadcast audience is constantly tuning in and out, prior warnings cannot completely protect the listener or viewer from unexpected program content. To say that one may avoid further offense by turning off the radio when he hears indecent language is like saying that the remedy for an assault is to run away from the first blow. One may hang up on an indecent phone call, but that option does not give the caller a constitutional immunity or avoid a harm that has already taken place." FCC v. Pacifica 2562.

7 Alexander Bickel, "On Pornography: Dissenting and Concurring Opinions," The Public Interest, 22 (Winter 1971), p. 26.

8 Chaplinsky v. State of New Hampshire, 315 U.S. 568, 572 (1942).

9 Cohen v. California, 403 U.S. 15, 21 (1971) Emphasis added.

10 FCC v. Pacifica 2559.

11 354 U.S. 476 (1957).

12 394 U.S. 557, 559 (1969).

13 See Martin v. Struthers, 319 U.S. 141, 143 (1943); Winters v. New York, 333 U.S. 507, 510 (1948); and Griswold v. Connecticut 318 U.S. 479, 482 (1965).

14 394 U.S. at 565.

15 U.S. v. Thirty-Seven Photographs, 402 U.S. 363, 376 (1971). See also U.S. v. Reidel, 402 U.S. 351 (1971).

16 Paris Adult Theatre I v. Slaton, 413 U.S. 49, 68, 67 (1973). See also U.S. v. Orito, 413 U.S. 139 (1973) and U.S. v. 12-200 ft. Reels of Super 8mm. Film, 413 U.S. 123 (1973).

17 Quoted in Paris Adult Theatre I, 413 U.S. at 59. See also Bickel, p. 26.

18 413 U.S. at 49 (Brennan, J., dissenting).

19 D.N. MacCormick, "Privacy and Obscenity," pp. 76-97 in R. Dhaven and C. Davies (eds.) Censorship and Obscenity. London: Martin & Co., 1978), pp. 78-79.

20 Griswold v. Connecticut, 318 U.S. 479 (1965).

21 See Thomas I. Emerson, "Freedom of Expression and Freedom of the Press," Harvard Civil Rights-Civil Liberties Review, 14 (Summer 1979): 329-360.

22 Bickel, p. 27.

23 id.

24 MacCormick, p. 89

25 Roth v. United States, 354 U.S. 476 (1957).

26 FCC v. Pacifica, 2553.

27 See: Sonderling Broadcasting Corp., 27 Rad. Reg. 2d (P & F) 285, on reconsideration, 41 F.C.C. 2d. 777 (1973); WUHY-FM, 24 F.C.C. 2d 408 (1970)

28 Pacifica Foundation 56 FCC 2d 94 (1975). For a fuller discussion of this case, see: Theodore L. Glasser and Harvey Jassem, "Indecent Broadcasts and the Listener's Right of Privacy," Journal of Broadcasting 24 (Summer 1980): 285-299.

29 Pacifica Foundation v. FCC 556 F. 2d 9 (D.C. Cir. 1977).

30 Pacifica Foundation, p. 99

31 FCC v. Pacifica, p. 2558.

32 FCC v. Pacifica, p. 2561.

33 Pacifica Foundation, p. 98.

34 FCC v. Pacifica, p. 2562 citing J. Sutherland in Euclid v. Ambler Realty Co. 272 U.S. 365, 388.

35 Id.

36 Glasser and Jassem, p. 295.

37 Pacifica Foundation, p. 97.

38 FCC v. Pacifica, pp. 1102-1111.

38 Consolidated Edison v. Public Service Commission, 100 S Ct. 2326, 2335 (1980). See also: Redrup v. N.Y., 386 U.S. 757, 769.

40 FCC v. Pacifica Foundation, 3 Med. L. Rptr. 2553, 2562 (S. Ct. 1978).

41
FCC v. Pacifica, p. 2567 (Powell, J. concurring).

42
As recalled in FCC's "Public Service Responsibility of Broadcast Licensees (Blue Book)," 1946, cited in Frank Kahn, ed., Documents of American Broadcasting 3d. ed. (Prentice Hall, Englewood Cliffs: 1978) p. 193.

43
Cohen v. California, p. 21.

44
Public Utilities Commission v. Pollak, 343 U.S. 451 (1952).

45
Cohen v. California, 29 L Ed 2d 284, 292 (1971).

46
FCC v Pacifica p. 1093. The FCC, in its order in Pacifica Foundation (56 FCC 2d 94, 99 (1975)) noted that "radio receivers are in the home, a place where people's privacy interest is entitled to extra deference." See also Sonderling, p.920.

47.
Kovacs v. Cooper, 336, U.S. 77 (1949).

48
FCC v. Pacifica, p. 2565 (Powell, J. concurring).

49
Erznoznik v. City of Jacksonville, 45 L Ed 2d 125, 133 (1975).

50
Ginsberg v. New York, 20 L Ed 2d 195, p.204 (1968).

51
Sonderling, p. 920.

52
Pacifica Foundation, 56 F.C.C. 2d 98 (emphasis added)

53
FCC v. Pacifica Foundation, 1104. Others make a similar argument. See D. Bragg, "Regulation of Programming Content to Protect Children After Pacifica," 32 Vanderbilt Law Review, 1377 (1979). Also, F. Haiman, "Speech v. Privacy: Is There a Right Not to Be Spoken To?" 67 Northwestern University Law Review 153 (1972).

54
See Haiman, p. 183.

55
FCC v. Pacifica 1104 (Brennan, J. dissenting).

56
Emerson, p. 56.

57
Haiman, p. 173.